No. 03-1687

IN THE

Supreme Court of the United States

REGINALD WILEY,

Petitioner,

v.

CITY OF CHICAGO and BRODERICK JONES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a plaintiff can recover damages arising from a criminal prosecution in a civil action when he denies that his action is brought on a theory of malicious prosecution.

2. Whether a plaintiff who fails to press a claim against a municipality on appeal has waived that claim for purposes of appellate review.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

On August 26, 2002, petitioner Reginald Wiley filed suit against respondents, Officer Broderick Jones and the City of Chicago, alleging a deprivation of his rights under federal law and seeking redress under 42 U.S.C. § 1983 (2000). R. 1. The complaint alleged that on January 9, 2000, Officer Jones planted drugs on petitioner and then arrested him on false charges. *Id.* The complaint also alleged that petitioner was required to appear repeatedly in court to answer the charges against him until they were dropped on July 8, 2002. *Id.* The complaint sought relief for an allegedly false arrest under the Fourth Amendment and for a deprivation of liberty without

due process of law in violation of the Due Process Clause of the Fourteenth Amendment. *Id.*[1]

The district court dismissed the action. The court concluded that petitioner could advance no due process claim because he was never tried on the charges against him and accordingly was not denied his due process right to a fair trial. Pet. App. 11-13. The district court also concluded that petitioner had failed to bring his Fourth Amendment false arrest claim in a timely fashion. Pet. App. 13. Petitioner sought reconsideration on only his Fourth Amendment claim. R. 18. The district court denied that motion, reasoning that a Fourth Amendment claim accrues when an allegedly unconstitutional search or seizure occurs, and not when criminal proceedings arising from that search or seizure are subsequently concluded. Pet. App. 16. The court accordingly ruled that because petitioner had failed to file suit within the applicable two-year limitations period following his arrest, his Fourth Amendment claim was untimely. Pet. App. 15, 17.

The court of appeals reversed the judgment in favor of Officer Jones, concluding that the district court had erred by ruling that petitioner's Fourth Amendment claim was untimely. Pet. App. 4-5. The court of appeals observed that in *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court had held that a section 1983 suit was premature if its success would "necessarily imply the invalidity of a conviction or sentence," and that the Seventh Circuit had previously held that the rule of *Heck* "applies not only to convicted persons but also to plaintiffs like [petitioner] who has yet only faced prosecution." Pet. App. 3. The court acknowledged that some wrongful arrest claims accrue immediately under *Heck*,

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[1] The complaint also sought relief under state law for the tort of malicious prosecution. R. 1 ¶ 9. The district court declined to exercise supplemental jurisdiction over the state-law claim. Pet. App. 13.

since "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." Pet. App. 3 (quoting *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996), cert. denied, 519 U.S. 1113 (1997)). Nevertheless, in this case, the court held that "[i]f, as alleged, [petitioner] was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of the prosecution premised on the planted drugs." Pet. App. 4. The court held that petitioner's Fourth Amendment claim did not accrue until the criminal charges against him were dropped and therefore the claim was timely. Pet. App. 4-5. The court added, however, that damages were available under the Fourth Amendment only for the period of time between petitioner's arrest and the filing of charges against him, at which point the applicability of the Fourth Amendment was at an end. Pet. App. 5-6. The court affirmed the judgment in favor of the City of Chicago, holding that petitioner had abandoned his claim against the City by failing to advance it on appeal. Pet. App. 6.

ARGUMENT

Petitioner complains that the court of appeals improperly confined his damages to the period of time between his arrest and the filing of charges, asserting that other circuits have reached inconsistent results with the holding below. Upon examination, however, the asserted conflict between the holding below and the law in other circuits disappears. Moreover, petitioner has waived any challenge to the Seventh Circuit's holding that an arresting officer is ordinarily responsible only for damages up to the point at which the arrestee is charged with a crime. In any event, that holding is consistent with this Court's precedents as well as the realities of the criminal justice system. Finally, while petitioner complains about the court of appeals' ruling that he abandoned his claim against the City of Chicago, his failure to press that claim on appeal properly resulted in its waiver.

In *Albright v. Oliver*, 510 U.S. 266 (1994), this Court considered whether police officers can be held liable under section 1983 for damages arising from a prosecution undertaken at their urging. The Court rejected the plaintiff's argument that the Due Process Clause forbids unwarranted prosecutions; a majority of the Court concluded that the Fourth Amendment's prohibition on unreasonable seizures, and not the Due Process Clause, addresses "deprivations of liberty that go hand in hand with criminal prosecutions." *Id.* at 274 (plurality opinion). Accord *id.* at 290-91 (Souter, J., concurring in the judgment). The four-Justice plurality explained that the Constitution's "Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Id.* at 274. Accordingly, the plurality concluded that the Fourth Amendment governs "the deprivations of liberty that go hand in hand with criminal prosecutions." *Ibid.* In his separate opinion, Justice Souter rejected Albright's due process theory by noting that none of the injuries described in his complaint "is alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody. Thus, [Albright] has not shown a substantial deprivation of liberty from the mere initiation of prosecution." *Id.* at 289.

In this case, the Seventh Circuit held that petitioner can advance a false arrest claim that accrued upon the termination of criminal proceedings against him, but that his damages on that claim are limited to the deprivation of liberty that occurred between his arrest and the filing of charges. See Pet. App. 5-6. Petitioner claims that other circuits have permitted section 1983 plaintiffs to recover damages associated with the prosecution of criminal charges following an arrest against arresting officers under either the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment. See Pet. 4-5 & n.3. In fact, none of the decisions on which petitioner relies stands in conflict with the decision of the Seventh Circuit in this case.

1. Most of the cases that petitioner cites in support of his claim that the Fourth Amendment permits recovery of the damages he seeks were brought on a theory of malicious prosecution. See *Kingsland v. City of Miami*, 369 F.3d 1210, 1222-23 (11th Cir. 2004); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126-27 (9th Cir. 2002); *Nieves v. McSweeney*, 241 F.3d 46, 53-54 (1st Cir. 2001); *Lambert v. Williams*, 223 F.3d 257, 260 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001); *Gallo v. City of Philadelphia*, 161 F.3d 217, 221-22 (3d Cir. 1998).[2] The damages available for malicious prosecution, however, differ from the damages available for false arrest. In *Heck*, the Court explained that a section 1983 action seeking damages for the plaintiff's confinement pursuant to legal process is properly characterized as an action for malicious prosecution:

> The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. If there is a false arrest claim, damages for that claim cover the time of detention up to the issuance of process, but no more. But a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of society.

512 U.S. at 484 (internal quotations and citations omitted). Petitioner, however, has abandoned any theory of malicious prosecution. As the court of appeals observed, "at oral

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[2] Petitioner also cites *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), in support of his Fourth Amendment claim, but in that case the court declined to decide what damages were available under the Fourth Amendment since it found that the plaintiff had also advanced an appropriate due process theory. See *id.* at 1286.

argument [petitioner]'s counsel insisted that his case was not one for malicious prosecution." Pet. App. 6. Thus, decisions recognizing a Fourth Amendment theory of malicious prosecution stand in no tension with this case, in which no such theory is presented. Accordingly, while there is unquestionably conflict in the circuits over the standards applicable to a section 1983 action for malicious prosecution, see, *e.g.*, *Castellano v. Fragozo*, 352 F.3d 939, 949-53 (5th Cir. 2003) (en banc), petitions for cert. filed, 72 U.S.L.W. 3580 (U.S. March 2, 2004) (No. 03-1269) & 72 U.S.L.W. 3659 (U.S. April 8, 2004) (No. 03-1417), that conflict is irrelevant here because petitioner has abandoned a theory of malicious prosecution.

As petitioner notes (Pet. 5), in *Albright*, Justice Ginsburg expressed the view that an individual facing criminal charges is subject to a "continuing seizure" as long as the prosecution lasts and accordingly a Fourth Amendment claim does not accrue until the prosecution ends. See 510 U.S. at 277-80 (concurring opinion). Two other Members of the Court expressed agreement with this view. See *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). Since then, three circuits have embraced Justice Ginsburg's view, at least when the plaintiff relies on a theory of malicious prosecution. See *Kingsland*, 369 F.3d at 1222; *Gallo*, 161 F.3d at 222-24; *Murphy v. Lynn*, 118 F.3d 938, 945-46 (2d Cir. 1997), cert. denied, 522 U.S. 1115 (1998).[3] Petitioner, however, disclaims reliance on a theory of malicious prosecution, as we note above. Moreover, before *Albright*, a number of circuits

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[3] Petitioner is wrong, however, to claim that the Fourth, Fifth, and Ninth Circuits have embraced this view. In *Castellano*, the Fifth Circuit declined to rest its decision on Justice Ginsburg's concept of a continuing seizure: "This view did not attract majority support in *Albright* and we need not here further define its limits." 352 F.3d at 959. In *Galbraith* and *Lambert*, there was no discussion of the concept of a continuing seizure. See *Galbraith*, 307 F.3d at 1126-27; *Lambert*, 223 F.3d at 261-62.

had rejected the concept of a "continuing seizure" that lasts until criminal proceedings have concluded (see 510 U.S. at 312 n.30 (Stevens, J., dissenting)), and at least five circuits have rejected that view since then. See Pet. App. 5-6; *Nieves*, 241 F.3d at 55-57; *Riley v. Dorton*, 115 F.3d 1159, 1162-64 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996); *Brothers v. Klevenhagen*, 28 F.3d 452, 456-57 (5th Cir.), cert. denied, 513 U.S. 1045 (1994).[4]

In any event, should the Court wish to grant plenary review to consider the "continuing seizure" theory petitioner urges, and on which there admittedly is a conflict in the circuits, it is more properly presented by the petition for certiorari that Officer Jones has filed seeking review of the Seventh Circuit's holding on the accrual issue in this case (No. 03-1717). While the first two questions in the petition here may relate to that issue, the first question in this petition is confusing, and both questions raise other issues as well. Moreover, Justice Ginsburg's opinion in *Albright* framed the issue presented by the theory of "continuing seizure" in terms of when a Fourth Amendment claim accrues, and that question is squarely presented by the petition filed by Officer Jones, but is at best indirectly raised in the questions presented in this petition. Moreover, as we explain above and again below, this petition is plagued by waiver problems, and accordingly is not a good candidate for plenary review.

2. In the decision below, the Seventh Circuit did not comment on petitioner's due process theory, presumably

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[4] There is also a conflict in the circuits on the related question whether a "seizure" for purposes of the Fourth Amendment encompasses only the initial deprivation of liberty by the authorities or continues as long as an arrestee remains in the custody of the arresting officers. See, *e.g.*, *Phelps v. Coy*, 286 F.3d 295, 300 (6th Cir. 2002), cert. denied, 537 U.S. 1104 (2003); *Fontana v. Haskin*, 262 F.3d 871, 879-80 & n.5 (9th Cir. 2001).

because petitioner abandoned it in his reply brief. In that brief, after briefly discussing a potential theory of due process liability, petitioner wrote:

> In this case, however, there is no need to consider any due process claim because "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." A police frame-up deprives the criminal defendant of the post-warrantless arrest judicial determination of probable cause . . . and is actionable as a Fourth Amendment violation.

Reply Brief of Plaintiff-Appellant at 5, *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir. 2004) (No. 03-1490) (citation omitted) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997)) [hereafter cited as "CA7 Reply Br."]. Thus, petitioner expressly waived his due process theory below.

Waiver aside, while Officer Jones's allegedly baseless arrest was unquestionably a Fourth Amendment violation, it did not also violate the Due Process Clause. In the Seventh Circuit, it has been settled since then-Judge Stevens's opinion in *Christman v. Hanrahan*, 500 F.2d 65 (7th Cir.), cert. denied, 418 U.S. 1050 (1974), that a section 1983 plaintiff cannot complain that he was deprived of due process of law based on the prosecution of unwarranted criminal charges when the prosecution did not result in a conviction. See Pet. App. 11-12. At least five circuits have adopted this same rule. See *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *Rogala v. District of Columbia*, 161 F.3d 44, 55-56 (D.C. Cir. 1998) (per curiam); *Taylor v. Waters*, 81 F.3d 429, 435-36 (4th Cir. 1996); *White v. Moulder*, 30 F.3d 80, 82-83 (8th Cir. 1994), cert. denied, 513 U.S. 1084 (1995); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988). This view does not leave petitioner without a remedy,

however, since the availability of damages for a malicious prosecution under Illinois tort law provides all the process that is due. See, *e.g.*, *Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir.), supplemented on denial of rehearing, 260 F.3d 824 (2001) (per curiam). See also *Albright*, 510 U.S. at 284-86 (Kennedy, J., concurring in the judgment).

While petitioner asserts that several circuits have adopted a contrary rule (Pet. 5), that claim does not withstand scrutiny. Two of the cases he cites involve section 1983 plaintiffs who had been convicted. See *Pierce v. Gilchrist*, 359 F.3d 1279, 1282-83 (10th Cir. 2004); *Castellano*, 352 F.3d at 943. Accordingly, these decisions are consistent with the law in the Seventh Circuit, which recognizes due process liability in such cases. See, *e.g.*, *Newsome*, 256 F.3d at 751-53. In two other cases, the plaintiff had alleged some additional injury separate from his arrest that would support a due process claim under the view expressed by Justice Souter in *Albright*. See *Moran v. Clarke*, 296 F.3d 638, 645-48 (8th Cir. 2002) (police officer was suspended, demoted, and stigmatized by false evidence and defamatory accusations); *Zahrey v. Coffey*, 221 F.3d 342, 344-46, 350-52 (2d Cir. 2000) (prosecutor and investigating officers conspired to fabricate evidence during the course of a lengthy investigation leading to an indictment). Petitioner, however, has never claimed that he suffered any injury in this case distinct from the deprivation of liberty occasioned by his arrest; nor has he placed any reliance on Justice Souter's view of due process expressed in *Albright*. Moreover, petitioner has repudiated any theory of malicious prosecution, as we explain above. The final due process case petitioner cites, *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), is completely inapposite. In that case, the court held only that an allegation of fabricating evidence was not barred by the preclusive effect of a state court's finding of probable cause to arrest in the underlying criminal case against the plaintiff. See *id.* at 871-72. In

Stemler, the court simply did not consider whether the plaintiff had advanced a proper due process claim under *Albright*.

3. Petitioner complains that the limitation on the damages recoverable on a Fourth Amendment false arrest claim recognized in the decision below is inconsistent with the rule that section 1983 defendants are properly held liable for all the natural consequences of their acts. See Pet. 6-7. But petitioner waived this argument below by expressly conceding that the damages attributable to a false arrest are cut off once the arrest results in legal proceedings:

> Damages for a false arrest end where there has been a judicial determination of probable cause: "A claimant pleading false arrest can pursue damages only for the detention that occurred 'up to issuance of process or arraignment, but not more.'" *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 900 n.9 (7th Cir. 2001), quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

CA7 Reply Br. at 2. Petitioner can hardly fault the court of appeals for adopting his own position on the available damages for a false arrest claim.

In any event, the court of appeals was correct to hold that the damages attributable to an arrest without probable cause end once the arrest leads to legal proceedings controlled by the prosecutor rather than the arresting officer. While section 1983 generally recognizes an officer's liability for any injury traceable to a constitutional violation, it has long been settled that section 1983 liability ends when there is an intervening or superceding cause of the plaintiff's injury. See, *e.g.*, *Martinez v. California*, 444 U.S. 277, 285 (1980). Under this rule, an arresting officer ordinarily is not liable for damages caused by an ensuing prosecution because the prosecutor's decision to go forward with charges based on his own assessment of the strength of the case and the credibility of

the witnesses is properly considered an intervening or superceding cause, at least when there is no allegation that the arresting officer participated in the prosecutorial decision. After all, as Justice Ginsburg has observed, a section 1983 claim against police officers based on an assertedly unconstitutional prosecution "is anomalous," since "[t]he principal player in carrying out the prosecution . . . is not police officer but prosecutor." *Albright*, 510 U.S. at 279 (concurring opinion).[5] There is usually no reason to doubt that prosecutors exercise independent judgment when deciding whether a police officer's account is sufficiently credible to warrant the pursuit of a criminal charge against an accused. Moreover, the Fourth Amendment does not address the process of deciding whether to file charges against an arrestee; it has instead long been settled that "the accused is not 'entitled to judicial oversight or review of the decision to prosecute.'" *Id.* at 274 (plurality opinion) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 118-19 (1975)). Thus, it makes little sense to consider damages flowing from a prosecutor's decision to bring charges as cognizable on a Fourth Amendment claim.

Accordingly, the Seventh Circuit has correctly concluded that police officers are ordinarily not liable on a false arrest claim for damages flowing from an ensuing prosecution even when the plaintiff claims that the arresting officer's account of his conduct was false. See, *e.g.*, Pet. App. 6; *Gauger v. Hendle*, 349 F.3d 354, 362-63 (7th Cir. 2003).[6] The Eleventh

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[5] Indeed, under Illinois law, it is the State's Attorney, not the police, who undertakes and controls the prosecution of criminal charges. See *People v. Woolums*, 379 N.E.2d 1385, 1390 (Ill. App. Ct. 1978). See also 55 ILCS 5/3-9005(a)(1) (2002).

[6] Even in the Seventh Circuit, however, when a police officer takes steps to prevent the prosecutor from accurately assessing the credibility of witnesses and the strength of a case, damages caused by an ensuing prosecution may be available. See, *e.g.*, *Jones v. City of Chicago*, 856 F.2d 985, 991, 993-95 (7th Cir. 1988).

Circuit has taken the same view. See *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999). For his part, petitioner does not identify any circuit to have ruled to the contrary.[7] To be sure, this issue is rarely litigated, but that is presumably because of the long-settled rule that a false arrest claim does not reach the arrestee's subsequent confinement pursuant to legal process. As we explain above, this Court made plain in *Heck* that a false arrest claim, unlike an action for malicious prosecution, does not permit recovery of damages caused by the arrestee's conviction or confinement. Petitioner, however, has abandoned a theory of malicious prosecution; his Fourth Amendment claim is only for a false arrest.

4. Petitioner also complains of the Seventh Circuit's holding that he had abandoned his claim against the City of Chicago. See Pet. 7-8. But in neither his principal nor reply brief in the court of appeals did petitioner say a word about his claim against the City of Chicago. For that reason, the court of appeals was entirely warranted in concluding that petitioner had abandoned the claim. In any event, petitioner's claim against the City was more than a little ridiculous. Petitioner claims that the City has a policy of tolerating the fabrication of evidence by its police officers, and the court of appeals could have easily concluded that petitioner did not seriously press such an outlandish accusation. Had petitioner wished to preserve this claim—for whatever it is worth—surely it is not asking too much to expect him to say a word

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[7] Petitioner relies instead on two of this Court's decisions, neither of which is pertinent. In *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court held that a prosecutor is not entitled to absolute judicial immunity for sworn statements made in support of applications for arrest warrants. See *id.* at 129-31. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court held that police officers were not immune for statements made for applications to obtain arrest warrants when the officer had no reasonable basis to believe that there was probable cause to support the warrant. See *id.* at 342-45. In both of these cases, therefore, suit was directed against the person who applied to a judicial officer for a warrant.

or two about it in his appellate briefs. Moreover, this narrow issue, of no significance to anyone but the parties here, does not merit plenary review by this Court.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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